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**Beyond Big Business:
Contests between Jurisdictions in a
Vertically Integrated Global Economy**

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Beyond Big Business: Contests between Jurisdictions in a Vertically Integrated Global Economy

Janet Walker*

1. Introduction

Whatever else marks the 21st century, the emergence and development of a truly global economy will be a central feature. An effective dispute resolution system — one that can resolve contests between jurisdictions fairly and expeditiously — will be critical to such an economy. As the Supreme Court of Canada noted a decade ago, citing earlier academic writings, "In a highly integrated world economy ... what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice."¹

I have just said that the development of a truly global economy lies ahead of us. However, many would say that the global economy is already with us - that its emergence is more accurately described as a 20th century phenomenon. The business of multinational corporations drive the economies of most nations and the impact of globalization is so widely felt that it can hardly be said to "lie ahead". As a starting point for this paper, though, I suggest a different view of the global economy, and I have amended the title accordingly. In my view, a truly global economy is what I have described in the title as a "vertically integrated" economy. This description might sound pretentious but there is nothing magical or profound intended by it. Rather, it is simply an effort to indicate that the "horizontal" integration, if you will, of a global economy that is achieved by the crossborder or multinational operation of large businesses will constitute a truly global economy only when it is supplemented by regular crossborder commerce involving individuals and small businesses. The multinational operation of large businesses no more constitutes a true global economy than the half-dozen or so of the largest law firms in any major business centre constitute the legal profession. A true global economy — a vertically integrated economy — is only now beginning to emerge as individuals and small businesses begin to participate directly in the international marketplace.

This is particularly significant for the legal profession. It is significant because as long as the global economy continued to be confined to a relatively small number of large, sophisticated market participants, so too was the need for specialized

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¹ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.

knowledge of international dispute resolution likely to remain comfortably confined to the relatively small number of firms who provided legal services to these large sophisticated market participants. As the process of "vertical integration" ramps up, however, awareness of the basic elements of international dispute resolution is rapidly becoming a necessary tool for effective lawyering, if not a professional obligation.

This paper is not, however, intended to advertise courses in the conflict of laws. As a person interested in the conflict of laws, I am grateful to those who confirm, when asked by students, that it is a useful course for them to take because this promises to improve the general understanding of the law in the area. But this paper is not intended to argue simply that vertical integration of the global economy is making it necessary for all lawyers know the basic rules of international dispute resolution. This paper will argue, instead, that vertical integration of the global economy is changing those rules. In making this argument, I will speak about three kinds of contests between jurisdictions. The first of these arises in circumstances in which the parties have entered into an agreement regarding the jurisdiction in which their disputes will be resolved. The second of these arises in circumstances in which there has been no such agreement and in which there are either alternative courts capable of resolving the parties' dispute, or in which the dispute has been submitted to more than one court. For each of these kinds of contest, I will begin by describing the current approach as it has evolved to meet the needs of what I described above as "horizontal integration". That is, I will describe how the law now seeks to meet the needs of participants in dispute resolution who are sophisticated and resourceful with respect to contests between jurisdictions, i.e., "big business", if you will. Then, I will suggest ways in which the law must move beyond the needs of big business to accommodate the needs of those of more modest resources and experience, in part, individuals, but particularly small businesses. The third of these kinds of contests arises in circumstances which are themselves the product of the vertical integration of the global economy. These kinds of contests are just now emerging. Accordingly, I cannot describe means that have been developed to address them. I can only describe how the law is evolving and will need to continue to evolve to meet the changing needs of a new vertically integrated global economy.

2. Jurisdiction Agreements and Party Autonomy

The first kind of contest arises in circumstances in which the parties have entered into an agreement regarding the jurisdiction in which their disputes will be resolved. As I have become fond of saying lately, I look forward to the day when the text

writers in the conflict of laws give the subject of the parties' consent the primacy it deserves in questions of jurisdiction. Even in domestic litigation, i.e., our state-sponsored mandatory dispute resolution system, we do everything possible to accommodate the wishes of parties who agree on the way in which their dispute should be resolved. We have long since been encouraging parties through costs incentives and other means to resolve as much of their dispute as possible between themselves, and to consent to any reasonable proposals for expediting what remains to be resolved by the courts. More recently, in Ontario, we have imposed mandatory mediation as a pre-requisite to access to the courts in many cases.²

It should be surprise, then, that it is coming to be recognized as equally important in international dispute resolution to accommodate the wishes of persons who agree on the way in which disputes between them should be resolved. In speaking about accommodating the wishes of parties to international disputes, I should clarify from the outset that I do not mean accommodating the wishes of persons who have agreed that their disputes should be resolved by way of international commercial arbitration. The deference granted to international commercial arbitration by national legal systems is well established. And it is well beyond the scope of this brief talk to address the considerable jurisprudence and commentary relating to the New York Convention³ and the UNCITRAL Model Law⁴ and the contests between the jurisdictions of these tribunals and national courts that are either averted or shaped by these regimes. Further, it is clear that international commercial arbitration will continue to constitute the most significant development in international dispute resolution for sophisticated and resourceful parties involved in commercial disputes, i.e., for those who can afford it. "Affording it" in this situation means both being in the position to bear the expense of a form of dispute resolution in which the tribunal is not state-subsidized, and being in a position to plan for disputes, usually in the context of ongoing business relations.

Instead, this paper is about accommodating the parties' wishes regarding their choice of *court* for the resolution of their dispute. The law relating to contests between the jurisdiction of national courts is also developing to accommodate the needs

² Rule 24.1, Ontario Rules of Civil Procedure, RRO 1990, Reg 194, as am O Reg 453/98.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958; 330 UNTS 38, No 4739 (1959).

⁴ United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration, 40 UN GAOR Supp (No 17), Annex 1 at 81, UN Doc A/40/17 (1985). The model law is in force in Canada pursuant to provincial legislation such as the International Commercial Arbitration Act, RSO 1990, c I.9.

of persons who have sufficient sophistication and resourcefulness to plan for dispute resolution but for whom private dispute resolution, such as arbitration, is not cost efficient. This is particularly important for the global economy as it becomes vertically integrated because it will increasingly involve such dispute resolution in national courts.⁵

How has the law regarding jurisdiction agreements—in particular, choice of court clauses—evolved to facilitate the fair resolution of contests between jurisdictions? The current state of the law is probably best described in two documents. They are the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Draft Hague Judgments Convention")⁶ and the "Third Interim Report of the Committee on International Civil and Commercial Litigation of the International Law Association" (the "ILA Report").⁷ These two documents are the product of collaboration between experts from a broad range of legal systems including civil law and common law systems, in both industrialized and developing countries. Each represents an effort to arrive at common principles relating to jurisdiction.

The Draft Hague Judgments Convention and the ILA Report were prepared for the Hague Conference on Private International Law and the International Law Association, respectively. The Hague Conference on Private International Law is an intergovernmental organization, dedicated "to work for the progressive unification of the rules of private international law"⁸ through the negotiation and drafting of multilateral treaties, called "Hague Conventions". The International Law Association is an international non-governmental organization established for the "study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill". Its work is carried on

⁵ See Walker "International Dispute Resolution in the 21st Century: The Role of National Courts" in *Looking Ahead: International Law in the 21st Century* (Kluwer, 2001, forthcoming)

⁶ "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters", adopted by the Special Commission of the Hague Conference on Private International Law on 30 Oct 1999, available online at <http://www.hcch.net/e/workprog/jdgm.html>.

⁷ International Law Association, Committee on International Civil and Commercial Litigation, "Third Interim Report: Declining & Referring Jurisdiction in International Litigation" available online at <http://www.ila-hq.org>

⁸ The Hague Conference has 47 Member States, including: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, the Federal Republic of Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, the Republic of Korea, Latvia, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Mexico, Monaco, Morocco, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, and Venezuela.

primarily through its International Committees which present reports at Biennial Conferences for discussion and endorsement.⁹ The Committee on International Civil and Commercial Litigation presented the report discussed in this paper at the 69th Biennial Conference in London in July 2000.

a) The Draft Hague Judgments Convention

The Draft Hague Judgments Convention was adopted by the Special Commission of the Hague Conference on 30 October 1999. It is the current official draft of the proposed multilateral convention for jurisdiction and judgments being negotiated under the auspices of the Hague Conference. The provision most relevant to the discussion of jurisdiction agreements is the first paragraph of Article 4¹⁰. This provision grants exclusive jurisdiction (unless the parties have agreed that it should be non-exclusive) to the courts nominated by the parties in their agreement, subject only to the nominated court declining to hear the matter. Other courts must not exercise jurisdiction unless and until that court has declined jurisdiction.

This provision is, or should be, relatively uncontroversial, and it is entirely suitable for those experienced in international commercial dealings. However, it presumes that jurisdiction agreements are inevitably the result of negotiations between

⁹ The International Law Association has about 4200 members in its national branches including lawyers in private practice, academia, government and the judiciary and non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organizations and chambers of commerce. Sixty-seven of its sixty-nine biennial conferences to date have been held in different countries.

¹⁰ Article 4 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra*, note 6 provides for jurisdiction clauses as follows:

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -

- a) in writing;
- b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- c) in accordance with a usage which is regularly observed by the parties;
- d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

....

sophisticated parties of equal bargaining power. There is no provision setting the standards for "substantial" or "essential" validity and there is only minimal allowance for the possibility of refusing to enforce agreements that do not represent the voluntary and informed agreement of both parties. Article 4.2, dealing with formal validity, provides that enforceable jurisdiction agreements must, at a minimum, be recorded in a manner that accords with a usage of which the parties ought to have been aware. An unrecorded agreement not in accordance with a usage of which the parties ought to have been aware would not meet the test of formal validity. There is not much scope beyond this narrow opportunity for testing the bargain. An important concern that is not addressed is that the standards for usages of which the parties ought to be aware is likely to be fairly volatile during the time in which individuals and small businesses are becoming accustomed to doing business across borders. Furthermore, this volatility is likely to be more pronounced in some places such as North America than it is in other such as Europe where a vertically integrated regional economy has been flourishing for decades.

It is true that special provisions are included in the Draft Hague Judgments Convention to ensure that consumers¹¹, and individual employees¹², are protected from

¹¹ Article 7 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra*, note 6, provides for consumer contracts as follows:
Article 7 - Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
 - a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
 - b) the consumer has taken the steps necessary for the conclusion of the contract in that State.
2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.
3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court—
 - a) if such agreement is entered into after the dispute has arisen, or
 - b) to the extent only that it allows the consumer to bring proceedings in another court.

¹² Article 8 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra*, note 6, provides for individual employment contracts as follows:
Article 8 - Individual contracts of employment

1. In matters relating to individual contracts of employment—
 - a) an employee may bring an action against the employer,
 - i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or
 - ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;
 - b) a claim against an employee may be brought by the employer only,
 - i) in the courts of the State where the employee is habitually resident, or
 - ii) in the courts of the State in which the employee habitually carries out his work.
2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court—
 - a) if such agreement is entered into after the dispute has arisen, or

jurisdiction agreements that would prejudice them in dispute resolution. In addition, the Convention provides that jurisdiction agreements cannot override exclusive jurisdiction that is accorded by law, such as that with respect to title to real property.¹³ Still, none of these provisions directly contemplates the concern that there are likely to be many new participants international commerce in the coming years who are insufficiently familiar with jurisdiction agreements for the law to assume that such persons ought to have appreciated the effect of these agreements when establishing international commercial arrangements.

b) The International Law Association Report

The ILA Report presented the Committee's research into legal techniques available for responding to the problems of forum shopping and concurrent jurisdiction and, the Committee's proposals for progressive reform of the law in the area articulated in its "Leuven/London Principles." The Committee observed early in its report that one of the fallacies of the forum shopping debate was that it was an issue that was relevant only in the largest of cases.¹⁴ Given this observation, one might expect that the Committee's

b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

¹³ Article 12 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra*, note 6, provides for exclusive jurisdiction as follows:

Article 12 - Exclusive jurisdiction

1. In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.

2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.

3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]

[6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

¹⁴ ILA Report, *supra*, note 7 at 5.

recommendations would reflect the concerns of the full range of market participants. This does not seem to be the case.

In its review of the development of the law on this subject, the Committee noted a difference between the treatment accorded jurisdiction clauses by civil law and common law courts. Civil law courts tended to regard jurisdiction clauses nominating another court as disabling them from hearing the case or requiring them to decline to do so. Common law courts tended to regard themselves, even in the face of a jurisdiction clause nominating another court, as entitled to exercise their discretion with regard to whether or not to decline jurisdiction. Historically, "common law courts had been hostile to jurisdiction clauses, characterising them as a means by private agreement of ousting the jurisdiction of the judicial organs of the state."¹⁵ The Committee noted that recently the common law position had moved closer to that taken in civil law countries so that nowadays, common law courts will refuse to give effect to an exclusive jurisdiction clause nominating another court only where there is a "strong cause".¹⁶

Having considered the history of the law on jurisdiction clauses and the current state of the law in common law and civil law countries, the Committee proposed the following principles on jurisdiction clauses for adoption:

- 3.1 If the parties have chosen the originating court as the exclusive forum for resolution of the matter, then that court shall exercise jurisdiction and shall not decline it ... [as provided for in a subsequent Principle].
- 3.2 If the parties have chosen an alternative court as the exclusive forum for the resolution of the matter, then the originating court shall either terminate its proceedings on the ground that it has no jurisdiction over the matter or as the case may be decline jurisdiction.¹⁷

These principles require courts to give effect to jurisdiction agreements and not to exercise discretion to accept or decline jurisdiction in a manner contrary to such agreements. The effect is much the same as the operation of Article 4.1 of the Draft

¹⁵ *Ibid* at 6.

¹⁶ *The Eleftheria* [1969] 1 Lloyd's Rep 237; This test continues to be applied in Canada. See *Ash v Lloyd's Corp* (1991) 6 O.R. (3d) 235; *Sarabia v "Oceanic Mindoro"* (1996), 4 CPC (4th) 11 (BCCA); *Rudder v Microsoft Corp* (1999) 40 CPC (4th) 394 (Ont Sup Ct).

¹⁷ A further principle, Principle 3.3 provides "If the parties' choice is not exclusive, the court may hear an applicant pursuant to ... [the subsequent Principle that provides for declining jurisdiction]." Principle 3.3 is largely reflective of the existing law in common law countries. In cases in which one of the parties proposes that the court either agree or refuse to exercise jurisdiction in the face of the parties' non-exclusive nomination of another court, the court will consider the jurisdiction agreement in the course of exercising its discretion to accept or decline jurisdiction. There is no need to dwell further on it. It was clearly included in order to bring the civil law into line with the common law.

Hague Judgments Convention. On its face, it seems unremarkable to suggest that courts should enforce the agreements of the parties before them. Indeed, it would be extraordinary to suggest otherwise. However, it seems equally unremarkable to observe that courts do not always enforce the agreements of the parties before them and that this is appropriate. I suggest that it is likely that courts will continue to determine that some jurisdiction agreements should not be enforced. The relevant question, then, is: What is the appropriate basis for refusing to enforce a jurisdiction agreement?

As the ILA Report observed, courts will exercise discretion to refuse to give effect to an exclusive jurisdiction clause nominating another court only where there is a "strong cause". Is this "strong cause" is to be understood in terms of the way in which the clause offends against the ordinary principles of the law of jurisdiction, or the way in which it offends against the ordinary principles of the law of contract? There seems to be little doubt that the general hostility shown to jurisdiction clauses in the past is a result of reviewing the validity of jurisdiction clauses in the context of the law of jurisdiction. After all, such a clause is likely to be relied upon and likely to be challenged only if it provides for a hearing in a forum other than the most appropriate forum. Accordingly, in the context of an analysis based on jurisdiction, jurisdiction clauses that, if enforced, would require a court to decline to hear a case even though it is otherwise an appropriate forum, seem bound to invite some hostility. As the work of the Hague Conference and the ILA Committee suggests, however, it is no longer sensible to continue to review jurisdiction clauses in this way. It is no longer appropriate to treat them with hostility as impermissibly usurping some core adjudicative function. The evolution of international commercial arbitration and a range of other alternative dispute resolution options have demonstrated the commercial utility of contractual allocations of the risks and benefits associated with the choice of a dispute resolution facility. Such choices should not lightly be disregarded.

A similar transition has been ongoing in the evolving approach to other kinds of agreements in commercial contracts that have been thought to relate to core elements of the adjudicative process, such as exclusion of liability clauses. At one time, agreements to exclude liability in commercial relations were vulnerable to being disregarded. This happened when a loss suffered through a breach of the contract for which there was to be no liability amounted to a "fundamental breach" of the contract and effectively deprived the innocent party of the benefit of the contract. If the contract was avoided for fundamental breach, so too was the exclusion clause. In recent times, though, the courts have come to recognize such clauses as a commercially valid means of

allocating risk for which there might be adequate consideration.¹⁸ Thus, where such a clause is an integral feature of an agreement negotiated between sophisticated parties of equal bargaining power, it is likely to be upheld. This does not mean that courts always give effect to such clauses. What it means is that such clauses tend no longer to be readily disregarded as impermissibly usurping some core adjudicative function but are disregarded only when they do not genuinely represent the agreement of the parties. Where such agreements are valid, giving effect to them facilitates commercial arrangements and accords the parties the benefit of streamlined dispute resolution, which is part of their bargain.

Suggesting that jurisdiction clauses should be reviewed for their validity in the context of contract law principles does not mean, however, as might seem to be the case under the Leuven/London principles, that courts should inevitably feel bound to give effect to such clauses. It does not mean that it should be assumed that jurisdiction clauses represent a valid agreement between the parties. In a newly "vertically integrated" global economy, not all parties are likely to be equally sophisticated with respect to such agreements. Indeed, over the coming years, while small businesses (and the persons who provide them with legal advice) are becoming acclimatized to the special features of international commercial contracts, such as jurisdiction agreements, it is likely that there will be substantial gaps in the general understanding of them. Courts will need to consider whether parties who appear to have agreed to restrictions on the availability of dispute resolution (either in the court in which the matter has been commenced or in another court) have, in fact, fully appreciated the nature of the agreement when entering into it.

The key point is that when considering whether there is a "strong cause" to disregard a jurisdiction clause, courts should not simply ask how the jurisdiction clause lines up with the other factors that would indicate the appropriateness of a particular forum had the parties not made any agreement regarding it. Nor should the court suggest that because the clause does not absolutely preclude the court from reviewing jurisdiction, the clause should be relegated to the mere status of just another factor to be considered in determining appropriate forum. If contractual terms were regularly treated in this way, contracts would be rendered useless — mere indications of the parties' views of what the general law would provide in any event. Rather, when considering whether there is a "strong cause" to disregard a jurisdiction clause, courts should ask only whether the contract is a valid one from the standpoint of contract law principles, given the

¹⁸ *Hunter Engineering Co v Syncrude Canada Ltd* [1989] 1 S.C.R. 426.

relative novelty of jurisdiction agreements and reasonable standards for appreciating them. This means that the relative inconvenience of the forum agreed upon should not be a ground in itself for disregarding the jurisdiction clause. Only where the extraordinary inconvenience of the nominated forum, coupled with other indications of the party's lack of sophistication, indicates that the party objecting to the jurisdiction clause could not reasonably have agreed to it, should the court have "strong cause" to disregard it.

In sum, the Hague Conference and the International Law Association are undoubtedly right to urge common law courts to give effect to jurisdiction clauses as an appropriate expression of party autonomy in international dispute resolution. However, as the vertical integration of the global economy advances, deference to party autonomy will need to be tempered, at least for a time, with the need to acknowledge that not all such agreements represent genuinely consensual arrangements between the parties. There will need to be some recognition in the law of the need to ascertain the contractual validity of the agreement.

3. Lis Pendens - Forum Non Conveniens

The second area of contests between jurisdictions arises in circumstances in which there has been no agreement on jurisdiction and there are alternative courts capable of resolving the parties' dispute, or in which the dispute has been submitted to more than one court. In this area the principal concern in recent years has been to reconcile the difference between the approaches taken by the civil law and those taken by the common law to resolving contests of jurisdiction. Each approach is fairly well established if not entirely uniform throughout the countries in which it operates.

a) Existing Approaches in the Civil Law and the Common Law

The civil law approach is perhaps best represented by Article 21 of the Brussels¹⁹ and Lugano Conventions.²⁰ Pursuant to Article 21, all courts save the court first seized of a matter must decline to hear the matter unless or until the court first seized

¹⁹ European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, 27 Sept 1968, 41 OJ Eur Comm (C 27/1) (26 Jan 1968) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) ("Brussels Convention").

²⁰ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), Official Journal of the European Communities 1988 L 319/9, reproduced in 28 ILM 620 (1989).

has declared itself incompetent to decide the matter.²¹ A court will determine itself incompetent to decide a matter pursuant to certain mandatory criteria, in particular, those that would indicate that another court has exclusive jurisdiction to decide the matter. However, beyond these mandatory criteria, the court has no authority to exercise discretion to decline a matter on the basis that there is another forum that is clearly more appropriate. Common law commentators have complained that this approach encourages forum shopping because it resolves contests between jurisdictions by a simple race to the courthouse.

The common law approach has no similar clear-cut means of determining contests between jurisdictions. Instead, where there is another court that is clearly more appropriate for the resolution of the dispute, the court will exercise its discretion to stay its proceedings in favour of proceedings that have or might be commenced in the more appropriate forum. Although this approach generally works well it can sometimes prompt contests between jurisdictions. This occurs in two situations. The first situation arises when it seems likely that the court that is clearly less appropriate cannot or will not decline to hear the matter, or when that court, in fact, refuses to exercise its discretion to decline to hear the matter. When this happens the objecting party might commence a parallel proceeding and enter into a "race to judgment", trying to obtain a judgment that can be presented to the first court as a basis for precluding further litigation in that court. The second situation arises when a party is denied a stay from the court the party regards inappropriate or when the party believes a stay will not be forthcoming, and that party applies to the court believed to be the more appropriate court for an order enjoining the opposing party from proceeding in the first court.

Situations involving competing proceedings and injunctions are admittedly troubling, but they are, in fact, relatively uncommon. Further, the degree of concern in any given legal system to ensure that matters proceed in the most appropriate forum and to prevent parallel proceedings tends to be proportionately matched by the degree of care with which courts will act in assuming jurisdiction so as to prevent parallel proceedings. In Canada, for example, parallel proceedings are increasingly being regarded as undesirable, and so the courts are giving considerable latitude to requests for

²¹ Article 21 of the Brussels Convention, *supra*, note 19 provides:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.

stays in favour of more convenient fora, and courts have become increasingly concerned to discourage parallel proceedings.²²

As mentioned above, the principal concern in recent years has been to reconcile the difference between the approaches taken by the civil law and those taken by the common law to resolving contests of jurisdiction. This is because, while both the common law and the civil law methods for resolving contests between jurisdictions seem to function tolerably well as between other common law or other civil law courts, they do not function well between one another. If, in the course of inappropriate forum shopping, a party selects a common law court, it is to be hoped that the objecting party will be able to persuade the common law court to decline to hear the matter. However, if, in the course of inappropriate forum shopping, a party selects a civil law court, provided that court is first seized, there will be no obvious way of having the matter heard in any other court. If the matter is subsequently commenced in a common law and that court is persuaded that, although it is the second seized, it is the clearly more appropriate forum, the common law court will be troubled by the opportunistic means by which jurisdiction was secured in the civil law court. There has been considerable debate about this problem in Europe where the existence of a regime facilitating the enforcement of judgments has made this a serious concern for the English courts. In some disputes, English courts, possibly in defiance of their obligations under the Brussels Convention, have issued injunctions to prevent matters commenced in inappropriate fora from proceeding in civil law courts.²³

b) Solutions Proposed by the Hague Conference and the International Law Association

The Draft Hague Judgments Convention and the ILA Report propose that this inconsistency between civil law and common law principles be reconciled by combining the two. Accordingly, Articles 21 and 22 of the Draft Hague Judgments Convention²⁴ and Principle 4 of the Leuven/London Principles,²⁵ provide that where there

²² See *472900 BC Ltd v Thrifty Canada Ltd* (1998) 168 DLR (4th) 602; *Westec Aerospace Inc v Raytheon Aircraft Co* (1999) 173 DLR (4th) 498, leave to appeal granted April 20, 2000 SCC Bulletin, 2000 at 733.

²³ See for example *Turner v Grovit* [1999] 3 WLR 794 (CA) upholding anti-suit injunction in wrongful dismissal case.

²⁴ Articles 21 and 22 of the Draft Judgments Convention, *supra*, note 6 provide in part:

Article 21 - *Lis pendens*

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless

is no jurisdiction agreement, all courts other than the court first seized, must not proceed to hear a case until the court first seized has determined, in accordance with principles of forum non conveniens, whether it should decide the case. It is hoped that by combining the civil law and common law approaches in this way, the best qualities of the two approaches would result. On the one hand, the requirement that courts determine in a principled way whether they are appropriate fora would prevent matters from being determined in inappropriate fora, which is presently possible under the civil law if a court is first seized and the minimal requirements for jurisdiction have been met. On the other hand, the requirement that all courts but the court first seized suspend their proceedings until the court first seized has made such a determination would prevent parallel

the latter has exclusive jurisdiction under Article 4 or 12.

....

Article 22 -Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 13, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular

- a) any inconvenience to the parties in view of their habitual residence;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

....

²⁵ Article 4 of the Leuven/London Principles, appended to the ILA Report, *supra* note 7 provides in part:

4.1 Where proceedings involving the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings until such time as the jurisdiction of the court first seized is established, and not declined under this Principle, and thereafter it shall terminate its proceedings. The court first seized shall apply Principle 4.3. Should that court refer the matter to a court subsequently seized in accordance with Principle 4.3, the latter court will not be obliged to terminate its proceedings.

....

4.3 An originating court shall decline jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on grounds of nationality. In making this decision, the court shall have regard in particular to the following factors:

- (a) the location and language of the parties, witnesses and evidence;
- (b) the balance of advantages of each party afforded by the law, procedure and practice of the respective jurisdictions;
- (c) the law applicable to the merits;
- (d) in cases under Principle 4.1, the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court's jurisdiction and the substantive progress of the respective actions;
- (e) the enforceability of any resulting judgment;
- (f) the efficient operation of the judicial system of the respective jurisdictions;
- (g) any terms of referral under Principle 5.3.

proceedings and anti-suit injunctions and the uncertainty regarding forum that is presently possible with the common law approach if courts other than the court first seized are permitted to decide cases or make determinations about jurisdiction. On the whole, it is very encouraging to think that it would be possible to combine the practices of two very different approaches in a single system that would reflect the strengths of both.

c) Concerns about Selecting the Forum that Determines the Appropriate Forum

Nevertheless, there is a sense in which this solution, like the solution reviewed in the previous section, is a solution suitable for the 20th century (i.e., for a horizontally integrated global economy) but not necessarily for the vertically integrated global economy of the 21st century. It is a solution that seems very sound in principle and, indeed, that seems likely to work well for sophisticated and resourceful parties engaged in jurisdictional contests. However, it could prove unsuitable for jurisdictional contests involving small businesses and those generally less sophisticated and resourceful with respect to jurisdictional disputes. This is because the court first seized might be obliged to determine whether it is an appropriate forum on principled grounds (and not simply on the grounds that it is first seized) but its exclusively authority to make this determination is based solely on the fact that it is first seized. Accordingly, although a party that objects to the court chosen will not necessarily be obliged to defend the case on the merits in that court, that party will nevertheless be obliged to challenge the assumption of jurisdiction by that court in that court. The unseemly race to judgment is potentially replaced by an unseemly race to choose the court that will determine appropriate forum. This is particularly significant in matters involving amounts that would be substantial to individuals and small businesses but would not be large enough to warrant the expense of mounting a jurisdictional challenge in a distant forum.

In raising this concern, I do not mean to suggest that the appropriate solution is for the court most handy to the objecting party to issue an injunction; nor do I mean to criticize the proposals of the Hague Conference or the ILA Committee for overlooking ready solutions. These are difficult questions that might, at present, admit only of imperfect answers. Still, if it has been acknowledged that the criteria for determining the appropriate forum for resolving a dispute should go beyond the mechanical "first-seized" approach and should include factors relating to the relative convenience of the parties, then similar criteria should also apply to the determination of the appropriate forum for determining which forum is more appropriate.

To be sure, this is not immediately productive of a practical course of action. Nevertheless, it is an important concern for a number of reasons. Perhaps the most important of these reasons has to do with the rather steep learning curve faced by the courts themselves as a result of the current proposals and the rapid increase in crossborder disputes. There is less likely to be prejudice suffered by a party who has minimal resources to challenge jurisdiction if the court that will make the determination is experienced in doing so and can be relied upon to be even handed. While it is to be hoped that courts will take a balanced approach to such determinations, it would be wrong to suggest that they are uniformly experienced in making them. They clearly are not. Accordingly, parties wishing to challenge jurisdiction in a court not familiar with deciding such matters will be more anxious, rather than less so, to ensure that they can participate as fully as possible in the determination. In time, the familiarity of courts around the world with international standards for resolving contests between jurisdictions will be well established. Then the importance of skilled and vigorous advocacy might accordingly be reduced. However, in the interim, it can well be imagined, if only in the eyes of persons challenging a choice of court, that the extent to which they feel they have adequate access to justice in the determination of appropriate forum could well appear to be a measure of the extent to which they have adequate access to justice at all.

Further, the extent to which courts can be relied upon to take an even handed approach to jurisdictional contests also reflects the extent to which the contests themselves can be determined solely in terms of the relative logistical inconvenience to the parties. That is, the more experienced courts become with resolving international disputes and the more confidence that parties develop in being treated in an even handed way regardless of where the matter is heard, the more likely they are to be confident that they will not have to overcome any parochial bias on the part of the court in respect of its own obligation to exercise jurisdiction to vindicate local interests. This, in turn, could have a salutary influence on the approach courts take to jurisdiction agreements and the issues discussed in the previous section. It will discourage courts from treating agreements nominating other courts as contractual concessions for which there could never be adequate consideration. It will encourage courts to see jurisdiction agreements as simple contractual allocations of the risk of increased expense in dispute resolution and not as unconscionable agreements to forgo access to justice.

d) Transfers of Proceedings and Transnational Litigation

Ultimately the awkwardness of the available means of resolving contests between jurisdictions is, in part, a result of the disjointed nature of international civil

jurisdiction itself. The problems associated with the exercise of jurisdiction by a court that is not an appropriate forum have already been mentioned as have the problems associated with the exercise of jurisdiction over a matter by more than one court. The decision by one court to decline to exercise jurisdiction because there is a more appropriate forum elsewhere does not ensure that the matter will be heard in the other court. The process of resolving contests between jurisdictions can be cumbersome, time consuming, and expensive. Ultimately, the seamless web of international dispute resolution needed to support the global economy will require bolder measures. It will ultimately require the establishment of mechanisms for courts to cooperate directly with one another to see that matters are decided in appropriate fora and that the determination of claims on their merits is not impeded by contests of jurisdiction. Models for such mechanisms exist or have been proposed in three jurisdictions. In the United States, the United States Code²⁶ provides for the transfer of matters between federal courts. In Australia, a legislative scheme²⁷ establishes concurrent legislation in all the Australian jurisdictions by vesting of the jurisdiction of each Australian court in every other Australian court, and it provides for the expeditious transfer of matters from one jurisdiction to another.²⁸ In Canada, the Uniform Law Conference has proposed legislation providing for transfers of proceedings that includes the transfer of parts of a proceeding and transfers to foreign jurisdictions.²⁹ Beyond these models for transfers of proceedings, it will also be necessary to establish mechanisms for courts to cooperate in the joint resolution of matters. This is occurring on an *ad hoc* and informal basis in the resolution of some multijurisdictional class proceedings.³⁰ In time, the demand for such cooperation will reach the point where it will be necessary to formalize procedures to make them more routinely available.

²⁶ 28 United States Code §1404.

²⁷ See, for example, Jurisdiction of Courts (Cross-Vesting) Act, 1987 (Cmwth)

²⁸ In *Re Wakim, ex party McNally* (1999) 163 ALR 270 (HCA) the High Court determined that that the jurisdiction of the state courts could not be vested in the federal courts. However, the cross-vesting scheme continues to operate between state courts.

²⁹ "Uniform Court Jurisdiction and Proceedings Transfer Act", Proceedings of the Uniform Law Conference 1994 at 48. The legislation is not yet in force.

³⁰ See, for example, *Parsons v Canadian Red Cross Society* (1999) 40 CPC (4th) 151 (Ont Sup Ct).

4. Emerging Contests between Jurisdictions

If the first two kinds of contests discussed in this paper seemed interesting, then what lies ahead promises to be exhilarating indeed. The emergence of a truly global economy is bringing with it new kinds of contests between jurisdictions in which traditional jurisdictional distinctions, which have formed the framework for such contests to date, will be barely recognizable. In some ways, this should not be surprising. Traditional jurisdictional distinctions have largely been the product of market regulation that is organized around political divisions based on national sovereignty. The contests increasingly tend to be organized on economic lines, such as those between differently regulated markets, which may or may not happen to coincide with traditional political divisions. To provide a sense of what lies ahead, I will briefly identify examples of three kinds of contests that are transforming, or that promise to transform the very nature of contests between jurisdictions. Each example could easily form the basis for a talk in itself, but they are worth identifying, even if they cannot be canvassed thoroughly, as a way of illustrating the point that the development of a global economy is itself changing the nature of contests between jurisdictions.

a) Harmonized Substantive and Procedural Law - the Vienna Sales Convention and the ALI Transnational Rules Project

The first of these examples echoes the practices of an era some centuries ago when merchant traders travelled the seas bearing commodities to and from exotic destinations. It involves the harmonization of the law of international trade. It reflects the principles of the *lex mercatoria*, or "law merchant", which regarded the law of international trade both as distinct from that of domestic trade and as a single, coherent set of principles that transcended national laws. One current example is the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) — the "Vienna Sales Convention",³¹ a codified set of principles governing transactions for the international sale of goods that has been adopted in fifty-four countries. This kind of "transformation" would largely eliminate contests between jurisdictions as they relate to the legal standards that would be applied to resolve disputes because the substantive law governing the international sale of goods would be harmonized.

Projects for the harmonization of private international law rules, to facilitate the resolution of conflicts between jurisdictions with respect to the applicable

³¹ The United Nations Convention On Contracts For The International Sale Of Goods, 1980 (CISG) is available online at <http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/toc.html>

law have been underway for many decades at the Hague Conference.³² However, at the American Law Institute, a project has recently been undertaken to harmonize the procedural rules for transnational civil and commercial disputes in national courts.³³ The benefits of such a project promise to be particularly useful in establishing the seamless web of dispute resolution in that national courts would otherwise always apply their own procedural rules, and this is sometimes sufficient in itself to prompt contests between jurisdictions. Again, to the extent that a contest between jurisdictions was fuelled by differences in procedural law, this harmonization project would tend to eliminate it. Both the Vienna Sales Convention and the Transnational Rules Project are developments that are driven by the vertical integration of the global economy in that they facilitate the resolution in national courts of disputes that once would generally have been resolved by arbitration.

b) New Law for New Kinds of Commerce - E-commerce

The second of these transformations relates to the emergence of kinds of disputes for which it is simply impossible to find analogies to traditional jurisdictional divisions on which to construct bases for resolving contests of jurisdiction. The classic example of this, although it will probably not be the only example to emerge, is that of e-commerce. In some ways the challenges presented by e-commerce might be no greater than those presented by any other new means of communication. Historically, the law has adapted to provide ways to resolve contests of jurisdiction and applicable law for contracts concluded by telephone, telex and fax. Contracts concluded by digital communications, for the most part, are just another variant on this theme. However, in other ways, e-commerce presents new challenges. This is because e-commerce involves not only contracts concluded in the virtual world but performed in real time and real geographical locations. E-commerce also involves contracts performed digitally, i.e., in the virtual world. Such contracts would not necessarily have any meaningful geographical ties that would alert parties to the likely forum for dispute resolution or the likely applicable law. Fortunately, the economic incentives to devise orderly means to address these issues are such that there are several promising projects under way. One such project is proceeding in conjunction with the Hague Judgments Convention.³⁴

³² For a complete listing of the projects of the Hague Conference on Private International Law see <http://www.hcch.net/e/index.html>.

³³ The text of the Principles and Rules of Transnational Civil Procedure, Preliminary Draft No. 2 (March 17, 2000) is available online at <http://www.ali.org>.

³⁴ Preliminary Document No 12 - "Electronic Commerce and International Jurisdiction", Ottawa, 28 February-1 March 2000, a summary of discussions prepared by Catherine Kessedjian with the co-operation

Another project, entitled the Global Cyberspace Jurisdiction Project, is sponsored by the American Bar Association.³⁵ Both have produced informative reports.

The first set of developments, discussed above, promised to transform the nature of contests between jurisdictions by eliminating the substantive law basis for them. The development of e-commerce dispute resolution holds the promise of developing in a way that will largely avoid contests between jurisdictions in that a uniform approach seems likely either to emerge or to be developed. Interestingly, the technological advances that generate the need for this specialized kind of dispute resolution will also assist in promoting uniformity in the approach taken to it.

c) New Approaches to Legal Standards and to Contests between Jurisdictions driven by new kinds of dispute resolution

In the first set of developments, the harmonization of international sale of goods law and of procedural law reflects the recognition that vertical integration of the global economy is in some sense just a part of the expansion of international commercial dealings, which have always had a certain coherence in the way in which they function. In the second set of developments, a uniform set of rules is likely to emerge in dispute resolution for a kind of commerce for which traditional distinctions between national rules are not meaningful. The third set of examples represents a change in legal standards and in contests between jurisdictions that comes about because of the development of new kinds of dispute resolution.

The first "new" kind of dispute resolution is that developing in the form of class actions. Class actions are now available in the American state courts and in the United States Federal courts and in the Canadian provinces of British Columbia, Québec and Ontario, and in the Federal Court of Australia and in the Australian state of Victoria. Grouped proceedings are also available in the English courts and they are being contemplated in Sweden and South Africa. Class actions are an obvious product of the vertical integration of the global economy, particularly where they represent the collective effort of consumers or workers or other citizen groups to obtain redress from larger market participants who have caused them harm or loss. Groups of wronged persons tend to be defined by labour markets and markets for products and services. Such markets do not necessarily coincide with political divisions, and the causes of loss

of the private international law team of the Ministry of Justice of Canada, is available online at <http://www.hcch.net/e/workprog/jdgm.html>.

³⁵ "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet" is available online at <http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf>.

involved frequently involve crossborder or multijurisdictional dealings. Therefore, contests of jurisdiction can emerge as a result both of the fact that claims involve multijurisdictional plaintiff classes and as a result of plaintiff classes needing or preferring to bring their claim in one jurisdiction even though the defendants are located in another.

I will mention only two examples of kinds of multijurisdictional class action that highlight some of the contests that can arise. The first involves class actions which are permitted to be brought in a jurisdiction in which class actions are available instead of in the jurisdiction where the defendant is located because the availability of class actions makes the claims viable. One recent example of this is the Ontario action in *Wilson v Servier Canada Inc*³⁶ in which the Ontario court assumed jurisdiction over a class action for harm caused by diet pills that had proved to be a health hazard. The Ontario court refused a request to decline jurisdiction in favour of France, where the defendant was located, in part, because it could not be demonstrated that France, a country in which class actions are not available, was a clearly more appropriate forum. A similar result was obtained in an action in the English courts for injuries suffered by workers exposed to asbestos in the course of their employment in South Africa. The exercise of jurisdiction over the UK parent corporation by the English court was endorsed by the House of Lords because the claimants would not have been able to pursue their claims in South Africa without the benefit the legal aid and multi-party procedures which they enjoyed in the English proceedings. The court acknowledged that the granting of a stay in that case would be a denial of justice in violation of Article 6 of the European Convention.³⁷

The second example of multijurisdictional class actions that highlights the kinds of contests between jurisdictions that are emerging is that of the stock fraud litigation involving YBM Magnex, a Pennsylvania corporation whose shares were traded on the Toronto Stock Exchange. Actions on behalf of investors have been brought in both Ontario and Pennsylvania. Recently the Pennsylvania court was asked to consider whether it could certify a plaintiff class that presumptively included Canadian residents.³⁸ This, in part, depended upon whether it was thought likely that Canadian courts would recognize the determination of the Pennsylvania court in such a class action as binding upon persons who might otherwise have commenced actions as individuals or as classes

³⁶ *Wilson v Servier Canada Inc*, unreported, Ont Sup Ct, September 13, 2000, [2000] OJ No. 3392

³⁷ *Lubbe v Cape Plc* unreported [2000] UKHL (20 July 2000), available on www.bailii.org.

³⁸ *Paraschos v YBM Magnex International Inc* No. 98 CV 6444 (East Dist Penn).

in Canadian courts. Actions had been commenced in Ontario but certification had not yet been sought.³⁹ While this might seem a difficult question to resolve at large, it is hard to see what prejudice might be suffered in this case by claimants in Ontario being presumptively included in a claim in the United States federal courts based on the U.S. Securities Act. Such a claim would benefit from the deemed reliance provisions for secondary trades of the Securities Act that are commonly described as based on the "fraud on the market" theory. This would greatly facilitate a class claim by dispensing with the need to prove each claimant's reliance on the defendants' misrepresentations. No such equivalent is yet available in Canadian law to facilitate class actions for misrepresentations affecting secondary market transactions.⁴⁰

Accordingly, in the example of the group actions commenced in Ontario and in the English courts, the availability of class actions can create a situation in which standards of liability of those places will be applied to dealings that might have occurred elsewhere. In this last example, it is possible that the availability of a particular statutory provision regarding an evidentiary point might create a situation in which the class actions themselves are viable in one jurisdiction and not another. In one situation the availability of class actions forms the basis for the contest between jurisdictions, in the other, the availability of a deeming provision forms the basis for the contest between jurisdictions that both have class actions. In both situations, it is possible that these contests will bring about harmonization of the law in the alternative jurisdictions, or they will highlight the need to determine whether the law that facilitates the claim should prevail over the law against which defendants would otherwise have their conduct measured.

The second new kind of dispute resolution that is transforming both legal standards and contests between jurisdictions is public interest litigation by governments. The internationalization of this innovative form of dispute resolution is a product both of the recognition of the significance of the interest shared by governments such as those in Canada and the United States in discouraging and preventing certain kinds of socially irresponsible behaviour, and of the willingness to privatize certain public regulatory functions. The results of the former —the recognition of a common interest— can be seen in recent examples in Ontario and British Columbia where the courts have given effect to orders issued by American courts for the reimbursement of expenditures made

³⁹ *Royal Trust Corp. of Canada v. Fisherman*, No. 98-GD-46096 (SC) *Mondor v. Fisherman*, No. 98-GD-45452 (SC).

⁴⁰ See, for example, *Carom v Bre-X Minerals Ltd* (1998) 41 OR (3d) 780.

by the United States government for environmental clean-up operations;⁴¹ for tracing and seizing assets in connection with actions for telemarketing fraud;⁴² and for disgorgement of profits obtained through securities fraud.⁴³ The results of the latter — the privatization of public regulatory functions— are being seen in actions based on RICO legislation such as that of the Canadian government against tobacco corporations in the United States District Court in New York for smuggling cigarettes over the Canadian border.⁴⁴ In that case, the District Court ruled that the revenue rule barred the claim but determined that the Canadian government had standing to sue under the RICO legislation in the same way that other persons had standing. Innovations in litigation like these are likely to continue to challenge the traditional framework for contests between jurisdictions.

⁴¹ *United States of America v Ivey* (1996) 26 OR (3d) 533 (Gen Div), *aff'd* (1996) 30 OR (3d) 370.

⁴² *United States of America v Levy* (1999) 45 OR (3d) 129.

⁴³ *United States (Securities and Exchange Commission) v Shull*, unreported (British Columbia Supreme Court, 5 August 1999) available on Quicklaw at [1999] BCJ No 1823; and *United States (Securities and Exchange Commission) v Cosby*, unreported (British Columbia Supreme Court, 29 March 2000) available on Quicklaw at [2000] BCJ No 626.

⁴⁴ *Attorney General of Canada v RJ Reynolds* N Dist NY (19 June 2000) 99-CV2194.